

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALEJANDRINA M. D'AMICO and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS CANTEEN SERVICES, Long Beach, Calif.

*Docket No. 97-2755; Submitted on the Record;
Issued May 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty.

The Board has duly reviewed the case on appeal and finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty.

On January 7, 1997 appellant filed a claim alleging that on August 29, 1996 she injured her back in the performance of duty. The Office of Workers' Compensation Programs denied her claim by decision dated February 25, 1997 finding that she failed to establish that her employment incident occurred as alleged.¹ Appellant requested a review of the written record and by decision dated June 13, 1997 and finalized June 16, 1997, the hearing representative affirmed the Office's February 25, 1997 decision.²

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury."³ These are the essential

¹ The Board notes that the Office first informed appellant of the defects in her claim in its February 25, 1997 decision. Although this violates the Office's nonadversarial policy, the Board finds that this is harmless error as appellant exercised her appeal rights following the Office's decision and submitted additional evidence in support of her claim. *But see Elaine K. Kreymborg*, 41 ECAB 256, 259 (1989).

² Appellant submitted additional new evidence in her appeal to the Board. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁴

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁵ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁶ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action.⁷ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁸

In this case, appellant reported on her claim form that she injured her back "Lift[ing] a stair and heavy boxes in preparation for the Labor Day sale." Appellant stated that her back was hurting then but that she did not pay too much attention to it until she became ill in October 1996. On the reverse of the form, appellant's supervisor, Craig Larson, stated that he was not informed of the employment incident until January 7, 1997. He further stated, "We do know that she does not lift many boxes, as she is on the cash register during the canteen open hours." Mr. Larson stated that appellant had never helped to set up a sale and that appellant operated the cash register when the store opened at 7:30 a.m.

Appellant submitted an additional narrative statement and asserted on August 29, 1996 that she lifted a heavy stair and moved two loads of heavy boxes to the video department. She stated that in addition to operating the cash register she also stocked and carried boxes. Appellant stated, "When I got sick on October 17[, 1996] my back really hurt bad and it even went down to my legs that I was unable to sleep that night before the 17th."

Appellant submitted a medical note dated August 31, 1996 which is illegible. A medical note dated January 7, 1997 indicated that appellant experienced right neck pain since lifting in September. On January 8, 1997 a physician diagnosed cervical strain.

The Board finds that appellant has not submitted sufficient factual evidence to establish that her employment injury occurred as alleged. Although appellant has consistently stated that she injured her back lifting in the performance of duty, her supervisor, Mr. Larson, denied that

⁴ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

⁵ *Elaine Pendleton*, *supra* note 3.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁸ *Id.* at 255-56.

appellant was required to lift and that she aided in preparation for a sale. Furthermore, the only medical evidence mentioning a back injury indicated that the injury occurred in September rather than August. As there is conflicting evidence regarding whether the employment incident occurred as alleged, the Office properly denied appellant's claim finding that she had not established fact of injury.

The decisions of the Office of Workers' Compensation Programs dated June 13, 1997 and finalized June 16, 1997 and February 25, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 6, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member